TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 165.

THE WEST WISCONSIN RAILWAY COMPANY AND D. A. BALDWIN, PLAINTIFFS IN ERROR,

vs.

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. ROCHFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 16, 1874.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the West Wisconsin Railway Company and D. A. Baldwin, and D. J. Foley, M. J. Foley, J. W. Hunter, and J. J. Rochford, a manifest error hath happened, to the great damage of the said West Wisconsin Railway Company and D. A. Baldwin, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, A. D. 1874, in the Supreme Court to be then and held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, this 30th day of July, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.]

F. M. STEWART,
Clerk of the Circuit Court of the United States for the Western District of Wisconsin.

H. S. ORTON,
Atty. for Plaintiffs in Error, Madison, Wis.

The return of the judge of the circuit court of the United States for the western district of Wisconsin appears by the schedule hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court at my office in the city of Madison, this 15th day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

F. M. STEWART,
Clerk.

(Indorsed:) U. S. Supreme Court. The West Wisconsin Railway Company and D. A. Baldwin, plaintiffs in error, vs. D. J. Foley, M. J. Foley, J. W. Hunter, & J. J. Rochford, defendants in error. Writ of error. Filed July 30, A. D. 1874. F. M. Stewart, clerk.

2 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a stated term of the circuit court of the United States for the western district of Wisconsin, begun and held according to law at the city of Madison, in said district, on the first Monday, (being the first day of June, A. D. 1874)—present and presiding, the honorable James C. Hopkins, district judge—among other the following proceedings were had, to wit:

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. Rochford
vs.
THE WEST WISCONSIN RAILWAY COMPANY and D. A. Baldwin.

Be it remembered that heretofore, to wit, on the 6th day of April, A. D. 1874, came the above-named plaintiffs, by Vilas and Bryant, their attorneys, and filed their præcipe for a summons on money-demand, as follows, to wit:

Præcipe.

United States circuit court western district of Wisconsin.

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. Rochford, plaintiffs,
vs.
THE WEST WISCONSIN RAILWAY COMPANY AND D. A. Baldwin, defendants.

Demand judgment for $25,880.19, with interest on $12,937.50 thereof at the rate of seven per cent. from the 18th day of February, A. D. 1874, and on $12,937.50 thereof, at same rate, from the 18th day of March, A. D. 1874.

3 F. M. STEWART, *Clerk:*

SIR: Issue summons in above-entitled action according to above directions, with complaint which is herewith filed annexed, and require copy of answer to be served on us at our office in city of Madison.

VILAS AND BRYANT,
Plaintiffs' Attorneys, Madison, Wis.

APRIL 6TH, 1874.

Whereupon a summons issued in said entitled cause as follows, to wit:

Summons.

Circuit court of the United States for the western district of Wisconsin.

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. Rochford, plaintiffs,
vs.
THE WEST WISCONSIN RAILWAY COMPANY AND D. A. Baldwin, defendants.
Summons for money-demand.

The United States of America to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiffs in this action which is filed in the office of the clerk of this court at Madison, in said district, a copy of which is herewith served upon you. And you are also required to file your answer thereto with the clerk of this court at Madison, and to serve a copy thereof on the attorneys of the plaintiffs, whose names are hereto subscribed, at their office in Madison, Wisconsin, within twenty days after the service of

this summons on you, exclusive of the day of such service, and
4 if you fail to answer the complaint as aforesaid, the plaintiffs will take judgment against you for the sum of twenty-five thousand eight hundred and eighty dollars and nineteen cents, with interest on $12,937.50 thereof at the rate of seven per cent. from the 18th day of February, in the year of our Lord one thousand eight hundred and seventy-four; and on $12,937.50 thereof, at same rate, from the 18th day of March, in the year of our Lord one thousand eight hundred and seventy-four, beside the costs of this action.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at the city of Madison, in said western district of Wisconsin, this 6th day of April, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

[SEAL.] F. M. STEWART,
Clerk.

VILAS AND BRYANT,
Attorneys, Madison, Wis.

And came the plaintiffs, by their said attorneys, and filed their complaint in said cause, as follows, to wit:

Complaint.

Circuit court of the United States for the western district of Wisconsin.

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. Rochford, plaintiffs,
against
THE WEST WISCONSIN RAILWAY COMPANY AND D. A. Baldwin, defendants.

WESTERN DISTRICT OF WISCONSIN, *ss:*

5 The plaintiffs above named, D. J. Foley, M. J. Foley, J. W. Hunter, and J. J. Rochford, by Vilas and Bryant, their attorneys, complain against the defendants above named, The West Wisconsin Railway Company and D. A. Baldwin, and respectfully show to the court—

That they, the said plaintiffs, are (and each one of them is) residents of the city of Baltimore, in the State of Maryland, and are (and each of them is) citizens of the said State of Maryland, and are partners in business, doing business as such partners at the said city of Baltimore, under the partnership name and style of D. J. Foley, Bro. and Company.

That *that* defendant D. A. Baldwin is a resident of the city of Hudson, in the county of St. Croix, in the said western district of Wisconsin, and a citizen of the State of Wisconsin. And the defendant The West Wisconsin Railway Company is a corporation duly created, organized, existing, and acting by and under the laws of the State of Wisconsin, and a citizen of the State of Wisconsin, and has its principal office and place of business at the said city of Hudson, in the said western district of Wisconsin, and owns and operates a railroad from the said city of Hudson to Elroy, in said western district.

That at the several times hereinafter named, the said D. A. Baldwin was, and now is, the president of the said corporation The West Wisconsin Railway Company, and one David Hurbird, hereinafter mentioned,

a citizen of said State of Wisconsin, was, and is, the assistant treasurer of said corporation The West Wisconsin Railway Company. And the said plaintiffs for their first cause of action show—

That at the city of New York, in the State of New York, at an office of the said corporation, at No. 74 Broadway, in said city of New York, on the 18th day of December, in the year of our Lord 1873, the defendant The West Wisconsin Railway Company, by its said president, the defendant D. A. Baldwin, made their bill of exchange in writing, bearing date on the said day last aforesaid, and directed it to said David Humbird, assistant treasurer (as aforesaid) of said West Wisconsin Railway Company, at said city of Hudson, in said western dis-
6 trict of Wisconsin, and therein and thereby required and commanded the said David Humbird, assistant treasurer as aforesaid, and the defendant The West Wisconsin Railway Company, to pay on the 15th day of February, A. D. 1874, to the order of the said defendant D. A. Baldwin, twelve thousand nine hundred and thirty-seven and $\frac{50}{100}$ dollars, for value received, and to charge the same to the account of the said defendant The West Wisconsin Railway Company.

That the said defendant The West Wisconsin Railway Company then and there delivered the said bill of exchange to the said defendant D. A. Baldwin, and the said defendant D. A. Baldwin then and there indorsed the said bill of exchange, and for a valuable consideration delivered the same, so indorsed, to these plaintiffs, before the maturity thereof.

That on the 26th day of December, A. D. 1873, the said David Humbird, assistant treasurer as aforesaid, and the said defendant, by its said assistant treasurer, David Humbird, upon presentation thereof, accepted the said bill of exchange in writing indorsed upon the face thereof.

That at the maturity of the said bill, on the 18th day of February, A. D. 1874, the same was duly presented for payment to the said David Humbird, assistant treasurer, and to said West Wisconsin Railway Company, but payment thereof was refused, and the same was not paid, and the same was thereupon duly protested for non-payment, and due notice of such presentment, non-payment, and protest was thereupon duly given to the said defendants and each of them, and the costs and expenses of such protest to these plaintiffs were $\$2\frac{06}{100}$ths.

That no part of the said bill of exchange has since been paid, and the plaintiffs are now the owners and holders thereof, and there remains justly due these plaintiffs thereupon the sum of twelve thousand nine hundred and thirty-seven and $\frac{50}{100}$ths dollars, ($12,937.50,) with interest thereon from the 18th day of February, A. D. 1874, besides the said costs of protest, two dollars and six cents.

And the said plaintiffs for their second cause of action show—

7 That at the city of New York, in the State of New York, at an office of the said corporation, at No. 74 Broadway, in said city of New York, on the 18th day of December, in the year of our Lord 1873, the defendant The West Wisconsin Railway Company, by its said president, the defendant D. A. Baldwin, made its bill of exchange in writing, bearing date on the said day last aforesaid, and directed it to said David Humbird, assistant treasurer (as aforesaid) of said West Wisconsin Railway Company, at said city of Hudson, in said western district of Wisconsin, and therein and thereby required and commanded the said David Humbird, assistant treasurer as aforesaid, and the defendant The West Wisconsin Railway Company, to pay on the 15th day of March, A. D. 1874, to the order of the said defendant D. A.

Baldwin, twelve thousand nine hundred and thirty-seven and $\frac{50}{100}$ths dollars, for value received, and to charge the same to the account of the said defendant The West Wisconsin Railway Company.

That the said defendant The West Wisconsin Railway Company then and there delivered the said bill of exchange to the said defendant D. A. Baldwin, and the said defendant D. A. Baldwin then and there indorsed the said bill of exchange, and for a valuable consideration delivered the same, so endorsed, to these plaintiffs, before the maturity thereof.

That on the 26th day of December, A. D. 1873, the said David Humbird, assistant treasurer as aforesaid, and the said defendant, by its said assistant treasurer David Humbird, upon presentation thereof, accepted the said bill of exchange in writing, endorsed upon the face thereof.

That at the maturity of the said bill, on the 18th day of March, A. D. 1874, the same was duly presented for payment to the said David Humbird, assistant treasurer, and to said West Wisconsin Railway Company, but payment thereof was refused, and the same was not paid, but was thereupon duly protested for non-payment, and due notice of such presentment, non-payment, and protest was thereupon duly given to said defendants and each of them. And the costs and expenses of
8 such protest to these plaintiffs were three dollars and thirteen cents, ($3.13.)

That no part of the said bill of exchange has since been paid, and the plaintiffs are now the owners and holders thereof, and there remains justly due these plaintiffs thereupon the sum of twelve thousand nine hundred and thirty-seven and $\frac{50}{100}$ths dollars, ($12,937.50,) with interest thereon from the 18th day of March, A. D. 1874, besides the costs of protest, three and $\frac{13}{100}$ths dollars.

Wherefore the plaintiffs pray judgment against the said defendants for the aforesaid sums, amounting together to the sum of twenty-five thousand eight hundred and eighty dollars and nineteen cents, ($25,880.19,) with interest on twelve thousand nine hundred and thirty-seven and $\frac{50}{100}$ths dollars thereof, from the 18th day of February, A. D. 1874, and with interest on twelve thousand nine hundred and thirty-seven and $\frac{50}{100}$ths dollars thereof from the 18th day of March, A. D. 1874, besides the costs of this action.

VILAS AND BRYANT,
Attorneys for Plaintiffs, Madison, Wis.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

William F. Vilas, being duly sworn, says that he is one of the attorneys for the plaintiffs in the above-entitled action, and resides at Madison, in said district; that he has read and knows the contents of the foregoing complaint, and he verily believes the same to be true. That the reason why this verification is not made by the plaintiffs is, that they and all of them are not within the said western district where this deponent and said plaintiffs' attorneys reside, and this action is founded upon written instruments for the payment of money only, to wit, the two bills of exchange mentioned in the complaint, which are now in the possession of this deponent as such attorneys; and that the grounds of deponent's belief are such bills of exchange, the certificates of protest annexed, and a written communication from the plaintiff relating
9 thereto, and statements made by an officer of said company defendant, as to its existence and officers.

WM. F. VILAS.

Sworn and subscribed before me this 6th day of April, A. D. 1874.
F. M. STEWART, *Clk.*

Return of summons.

Served on the within-named West Wisconsin R. R. Co. by delivering to Frank B. Clarke, the general freight-agent of said company, a copy of this summons and complaint annexed the 8th day of April, A. D. 1874. And the said defendants, by their solicitors and attorneys, accepted service in writing for both of the defendants herein named; which acceptance is hereto annexed.

Served on the within-named D. A. Baldwin by leaving a copy of this summons and complaint annexed at his usual place of abode, in presence of a member of his family of suitable age and discretion, whom I informed of the contents thereof, he not being found, this 8th day of April, A. D. 1874.

F. W. OAKLEY, *Marshal*,
By F. D. HARDING, *Deputy*.

The acceptance referred to in the return of the summons above is as follows:

We hereby accept service upon the West Wisconsin Railway Company and D. A. Baldwin, defendants in the above action, and have received copies of the summons and complaint in said case and hereto annexed, waiving all irregularities in manner and form of such service.

Madison, Wis., April 28, 1874.

ORTON, KEYES & CHYNOWETH,
Attys. for Defendants.

And afterwards, to wit, on the 1st day of June, A. D. 1874, came the said defendants, by their attorneys, and filed their answer in said entitled cause, as follows:

Answer.

10 Circuit court of the United States for the western district of Wisconsin.

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. Rochford
vs.
THE WEST WISCONSIN RAILWAY COMPANY AND D. A. Baldwin.

The said defendants, answering the complaint herein, deny the following allegations in the said second cause of action, viz: "That at the maturity of the said bill, on the 18th day of March, A. D. 1874, the same was duly presented for payment to the said David Humbird, assistant treasurer, and to said West Wisconsin Railway Company, and that the same was duly protested for non-payment," and said defendants say that they are informed and believe that said bill, mentioned in said second cause of action in said complaint, was not duly presented for payment to said David Humbird, assistant treasurer, and to the said West Wisconsin Railway Company, or either of them, at the maturity of said bill, on the 18th day of March, or at any other time, and that the same was not duly protested for non-payment.

And for a further and second defense to said action, said defendants say that on or about the 18th day of December, A. D. 1873, it was understood and agreed between and by the said West Wisconsin Railway Company, the said David Humbird, and the said D. A. Baldwin and D. J. Foley, one of the said plaintiffs, that the said Foley should act for them in the city of Baltimore, and as their agent, to pay and discharge interest becoming due, for the year ending January 1st, A. D. 1874, on certain bonds of the West Wisconsin Railway Company held in and about the city of Baltimore, in the State of Maryland, commonly known as land-grant bonds, and to negotiate and use for that purpose the bills of exchange set out in said complaint. That said bills were executed in
the form adopted, to facilitate their negotiation for the purpose
11 aforesaid, and for no other purpose; and it was understood and agreed that the said bills should be paid by the said railway company alone, and by no one else. That it was also further understood and agreed that the said D. J. Foley should, on the payment of said interest, obtain the coupons attached to said bonds embracing said interest and deliver the same to said company without delay.

These defendants are informed and believe that said D. J. Foley did obtain said coupons, but, instead of delivering them up to the said company, now holds them against said West Wisconsin Railway Company as a subsisting and outstanding indebtedness of said company to him, and has utterly failed and refused to deliver the same to said company, or destroy the same, in violation of his said agreement.

And further answering, defendants say that they are informed and believe that the said D. J. Foley still holds and owns the bills of exchange set out in said complaint, and that the other of said plaintiffs are not the lawful holders and owners thereof with the said D. J. Foley, or interested therein, and that said bills were indorsed and delivered to said D. J. Foley alone for the purpose aforesaid.

And further answering, said defendants say that the said plaintiffs, M. J. Foley, J. W. Hunter, and J. J. Rochford, had knowledge of the agreements and transactions aforesaid, as they are informed and believe; and said defendants further say that the said D. J. Foley has not accounted with the said West Wisconsin Railway Company, or with the said Humbird, or the defendant D. A. Baldwin, for the proceeds of said bills, and has refused and neglected to deliver said coupons or account for the same, although often requested so to do. The defendants therefore pray judgment that said complaint be dismissed with costs.

ORTON, KEYES & CHYNOWETH,
Attys. for Defendants.

STATE OF NEW YORK,
City of New York, ss:

12 D. A. Baldwin, one of the above defendants, being duly sworn, upon his oath saith that he has read the above answer and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to such matters he believes it to be true.

D. A. BALDWIN.

Sworn and subscribed before me this 16th day of May, A. D. 1874.
[SEAL.] F. E. TROWBRIDGE,
A Commissioner for the State of Wisconsin in New York.

And now, on the 21st day of May, A. D. 1874, came the plaintiffs, by their said attorneys, and filed their demurrer to the defendants' answer, as follows:

Demurrer to answer.

Circuit court of the United States, western district of Wisconsin.

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, and J. J. Rochford
vs.
THE WEST WISCONSIN RAILWAY COMPANY and D. A. Baldwin.

The plaintiffs above named, by Vilas and Bryant, their attorneys, demur to all that part of the answer of said defendants which begins with the words, "And for a further and second defense," and ends with the conclusion of the answer for the reason that, upon its face, it does not constitute a counter-claim or defense to the plaintiffs' action or complaint.

Wherefore they pray judgment as in the complaint demanded.

VILAS AND BRYANT,
Attorneys for Plaintiffs.

13 On this day, to wit, the 2d day of June, in the June term, A. D. 1874, of said court, in the record of the proceedings thereof in said entitled cause, before the honorable James C. Hopkins, judge, is the following entry, to wit:

Trial and verdict.

Circuit court of the United States, western district of Wisconsin.

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, and J. J. Rochford
vs.
THE WEST WISCONSIN RAILWAY COMPANY and D. A. Baldwin.
At law.

The demurrer coming on to be heard, and having been argued by counsel of the respective parties, and the court, being now sufficiently advised, doth order that the said demurrer be, and the same is hereby, sustained. And, on motion of defendants' attorneys, it is ordered that said defendants have leave to withdraw the first part of their answer, denying the due presentment and protest of the bill of exchange mentioned in the second cause of action of the complaint; whereupon a jury is ordered to assess the plaintiffs' damages, who came, to wit: W. A. Johnson, Orange Cook, William Hudson, C. B. Helm, W. W. Wood, Daniel Mawe, L. W. Wright, Theodore Thompson, C. G. Mayers, Norman Randall, J. B. Wiser, G. H. Stocking, twelve honest and lawful men of the district, duly empanneled, tried, sworn, and charged, and the jurors of the jury aforesaid, upon their oaths, do say that they have assessed the damages to the plaintiffs at the sum of twenty-six thousand three hundred and thirty-three dollars, ($26,333.00;) whereupon it is considered and adjudged by the court now here that the said plaintiffs do have and recover of the said defen dants, the West Wisconsin Railway Company and D. A. Baldwin, the said sum of twenty-six thousand three hundred and thirty-three dollars, so as aforesaid assessed by the jury, with
14 one hundred and thirty-four dollars and forty cents, their costs about their said suit in this behalf expended, and that the defendants have a stay of execution for a period of forty days.

On this day, to wit, the 30th day of July, A. D. 1874, the said defendants, by their attorneys, filed in said court, in said entitled cause, his bond on writ of error, which said bond is in the words and figures following, to wit:

Bond on writ of error.

Supreme Court of the United States.

THE WEST WISCONSIN RAILWAY COMPANY and D. A. Baldwin, plaintiffs in error,
vs.
D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, and J. J. Rochford, defendants in error.

Know all men by these presents that we, Abram H. Baldwin, John Comstock, A. J. Goss, and James R. Isman, of the county of Saint Croix, State of Wisconsin, are held and firmly bound unto D. J. Foley, M. J. Foley, J. W. Hunter, and J. J. Rochford, of the city of Baltimore, State of Maryland, in the sum of thirty-five thousand dollars, to be paid to the said D. J. Foley, M. J. Foley, J. W. Hunter, and J. J. Rochford, their executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our andeach of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 29th day of July, A. D. 1874.

Whereas the above-named West Wisconsin Railway Company and D. A. Baldwin have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Wisconsin:

15 Now, therefore, the condition of this obligation is such, that if the above-named West Wisconsin Railway Company and D. A. Baldwin shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

Sealed and delivered this 29th day of July, A. D. 1874.

ABRAM H. BALDWIN. [SEAL.]
JOHN COMSTOCK. [SEAL.]
A. J. GOSS. [SEAL.]
J. R. ISMAN. [SEAL.]

STATE OF WISCONSIN,
Saint Croix County, ss:

Abram H. Baldwin, John Comstock, and A. J. Goss, being first severally duly sworn, each for himself, upon his oath, says that he is worth the sum of fifty thousand dollars in property situated within the State of Wisconsin, over and above all just debts owing and all exemptions by law.

A. H. BALDWIN.
JOHN COMSTOCK.
A. J. GOSS.

Subscribed and sworn to before me this 29th day of July, A. D. 1874.

JA. A. ANDREWS,
Notary Public, St. Croix Co., Wis.

STATE OF WISCONSIN,
St. Croix County, ss:

James R. Isman, being first duly sworn, upon his oath says that he is worth the sum of forty thousand dollars in property situated within the State of Wisconsin, over and above all just debts owing and all exemptions by law.

J. R. ISMAN.

Subscribed and sworn to before me this 29th day of July, A. D. 1874.
JA. A. ANDREWS,
Notary Public, St. Croix Co.

STATE OF WISCONSIN,
Saint Croix County, ss:

Be it remembered that on this 29th day of July, A. D. 1874, personally appeared before me, the undersigned, a notary public in and for said county, the above-named Abram H. Baldwin, John Comstock, and J. R. Isman, to me known to be the persons whose names are subscribed to and who executed the foregoing undertaking, and severally acknowledged the execution thereof to be their free act and deed for the uses and purposes therein mentioned.

JA. A. ANDREWS,
Notary Public, St. Croix Co., Wis.

(Endorsed:) Approved July 30, 1874. J. C. Hopkins, judge.

16 And on the same day, to wit, on the 30th day of July, A. D. 1874, came the above-named defendants, by their attorneys, and filed citation on writ of error as follows, to wit:

Citation on writ of error.

UNITED STATES OF AMERICA, *ss:*

To E. J. Foley, M. J. Foley, J. W. Hunter, and J. J. Rochford, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Wisconsin, wherein the West Wisconsin Railway Company and D. A. Baldwin are plaintiffs and you are defendants, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable James C. Hopkins, judge of the district court of the United States for the western district of Wisconsin, this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-four.

J. C. HOPKINS,
District Court of the United States for the Western District of Wisconsin.

(Endorsed:) Service admitted. Vilas & Bryant, plffs.' attys.

And on the same day, to wit, on the 30th day of July, A. D. 1874, came the plaintiffs in error and filed assignment of errors, as follows:

Assignment of errors.

17 Supreme Court of the United States, of the October term, in the year of our Lord one thousand eight hundred and seventy-four.

THE WEST WISCONSIN RAILWAY COMPANY and D. A. Baldwin, plaintiffs in error,
vs.
D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. Rochford, defendants in error.

Afterward, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, came the said West Wisconsin Railway Company and D. A. Baldwin, plaintiffs in error, by H. S. Orton, their attorney, and say, in the record and proceedings aforesaid there is manifest error in this, to wit, the said circuit court erred in sustaining the demurrer to the answer in said action, and in ruling and deciding that said answer did not present a good defense to said action, and in rendering judgment herein. And the said West Wisconsin Railway Company and D. A. Baldwin pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

H. S. ORTON,
Attorney for Plaintiffs in Error.

Whereupon on the same day came the above-named defendants in error, by their attorneys, and filed joinder in error, as follows:

Joinder in error.

Supreme Court of the United States.

18 WEST WISCONSIN RAILWAY COMPANY and D. A. Baldwin, plaintiffs in error,
vs.
D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. Rochford, defendants in error.

And afterward, to wit, on the day of , in the year of our Lord one thousand eight hundred and seventy-four, the said D. J. Foley, M. J. Foley, J. W. Hunter, and J. J. Rochford, by Wm. F. Vilas, their attorney, freely came here into court and say, that there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid; and they pray the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error; and that the judgment aforesaid may in all things be affirmed.

WM. F. VILAS,
Attorney for Defendants in Error.

Certificate to transcript.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings in said entitled cause, now remaining on file and of record in my office in the city of Madison, in said district, and that the same is a true and correct transcript therefrom; and also a true copy of the bond on writ of error, citation, and assignment of errors, and joinder in error in said cause.

19 In witness whereof I have hereunto set my hand and affixed the seal of the said circuit court of the United States for the western district of Wisconsin, at my office in the city of Madison, this 15th day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.]

F. M. STEWART,
Clerk of the Circuit Court of the United States
for the Western District of Wisconsin.

(Indorsement on cover:) No. 165. The Western Wisconsin Railway Company & D. A. Baldwin, plaintiffs in error, vs. D. J. Foley, M. J. Foley, J. W. Hunter, & J. J. Rochford. W. Wisconsin C. C. U. S. Filed 16th October, 1874.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1876.

NO. 164.

THE WEST WISCONSIN RAILWAY COMPANY AND D. A. BALDWIN
PLAINTIFFS IN ERROR,

VS.

D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. ROCHFORD,
DEFENDANTS IN ERROR.

NO. 165.

THE SAME, PLAINTIFFS IN ERROR,

VS.

THE SAME, DEFENDANTS IN ERROR

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR DEFENDANTS IN ERROR.

WM. F. VILAS,
Counsel for Defendants in Error.

Supreme Court of the United States.

NO. 164.

THE WEST WISCONSIN RAILWAY COMPANY AND D. A. BALDWIN
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D. J. FOLEY, M. J. FOLEY, J. W. HUNTER, AND J. J. ROCHFORD,
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

This action was brought by the defendants in error to recover the contents of a bill of exchange drawn and accepted by the Railway Company, and endorsed by D. A. Baldwin.

The complaint alleged, first, the partnership of the defendants in error, the corporate existence of the plaintiff in error, the West Wisconsin Railway Company; and then, that on the 18th of December, 1873, in New York, the Company, by Mr. Baldwin, its president, made their bill of exchange, of that date, upon the assistant treasurer of the company at Hudson, Wis., requiring him to pay to the order of Mr. Baldwin, one of the plaintiffs in error, on the 15th day of May, 1874, $12,937.50; that Mr. Baldwin endorsed it as an accommodation endorser for the benefit of the company, and for a valuable consideration delivered it to the defendants in error. The subsequent acceptance of the bill by the

assistant treasurer of the company, its non-payment at maturity, presentment, protest, and notice, are then set forth.

See Record, pp. 3 and 4.

The plaintiffs in error answered together, that on the 18th of December, 1873, it was agreed between the company, Mr. Baldwin, and Mr. D. J. Foley, one of the defendants in error, that Mr. Foley should act as agent for them at Baltimore to pay the interest to become due the succeeding first of January, on certain bonds of the company, "and to negotiate and use for that purpose" the bill sued for; that "to facilitate its negotiation for the purpose aforesaid, and for no other purpose," the bill was made and endorsed; "that it was understood and agreed that said bill should be paid by the said railway company, and no one else"; that it was also agreed that Mr. Foley should, on payment of such interest, obtain the coupons therefor, and deliver the same to the company without delay; and that they "are informed and believe" that he "did obtain said coupons, but, instead of delivering them up to said company, now holds them against said company as a subsisting and outstanding indebtedness of said company, and has utterly refused to deliver the same or to have them destroyed or canceled, in violation of his said agency and agreement." They further alleged that the bill was delivered to Mr. D. J. Foley, and not to the defendants in error together or jointly, and that they "have not sufficient knowledge or information to form a belief as to whether" the defendants in error, other than he, have any interest in the bill, or are owners thereof with him, "and leave the same to be proved, and therefore deny that they are the owners of the same"; but averred, "on information and belief," that all had knowledge of the agreements and transactions aforesaid; and further that Mr. D. J. Foley has not only not delivered up the coupons, but has utterly neglected to account for the same, or for the

proceeds of said bill, although often requested.

And they prayed judgment that the complaint be dismissed.

See Record, pp. 5 and 6.

To this answer, the defendants in error demurred, for the reason that upon its face it does not constitute a defence to the action.

Upon argument, the circuit court sustained the demurrer, and the plaintiffs in error declining to ask leave to amend, judgment was given against them.

Secs. 2, 21, 27, ch. 132, R. S. Wis. 1858; Secs. 2, 24, 32, 2 Tay. Stat., 1493, 1499, 1501.

I.

The answer does not state any defense to the action.

A. The execution, endorsement, delivery, and acceptance of the bill are admitted, and its binding obligation confessed. No want of consideration is shown. On the contrary it is alleged that the coupons to raise money to pay which the bill was delivered, and which Mr. Foley agreed, as agent, to obtain, *he did obtain;* so that not only was the bill made upon a sufficient agreement, but the purpose of it has been fully accomplished. It is not pretended but that every dollar for which the bill was drawn was faithfully expended in the payment of interest for the company.

But the substance of the contention is, that Mr. Foley having

lawfully negotiated the bill and applied the proceeds to the payment of interest, as agreed, has not delivered the coupons to the company to be canceled. It furnishes no reason why the bill should not be paid.

Mr. Foley may be entitled to a lien on the coupons for advances in excess of the bill, or for commissions. The bill having been dishonored, he would clearly be entitled to a lien on the coupons after its dishonor, and it is not alleged that there was any refusal to surrender the coupons before the dishonor of the bill.

Muller v. Pondir, 55 N. Y., 325.
Chappell v. Cady, 10 Wis., 111.
Bolland v. Bygrave, Ry. & Mood., 271.

Whether, however, Mr. Foley be or be not entitled to a lien upon the coupons, on the facts stated in the answer, his failure to surrender them does not defeat the obligation of the bill of exchange. No damage or injury is alleged to have followed from it, and it is apparent none can arise. The coupons are paid, they are past due, and cannot be re-issued. They remain, after having been paid, in the hands of the agent of the company appointed to pay them.

The agreement of the agent to surrender the coupons after paying them, did not go to the consideration of the bill, but was entirely independent of it, and for the performance of an act subsequent to the negotiation and validity of the bill. The defendants in error are none the less entitled to recover the contents of the bill, which they have advanced for the benefit of the company and on the faith of it, although they knew the agent, who was fully authorized to negotiate it, had also agreed with his principal that he would employ the proceeds in a particular way; and their right to have it paid at maturity was perfect then, and cannot be defeated

by their subsequently learning that, although he employed the proceeds, as agreed, in paying his principal's debt, he has not yet surrendered the defunct evidences of it.

B. The averment that "it was understood and agreed that said bill should be paid by the said railway company, and no one else," is frivolous. The necessity for verifying the answer compelled the statement to assume the weak form in which, with no great elasticity of conscience, it may be applicable to any such case; for it can be said of every bill that it was understood and agreed the acceptor should *pay* it, and no one else. That cannot be construed as an allegation that the endorser was not to be looked to upon protest and notice, if the acceptor did not pay it upon due presentment.

If it meant all that, however, it would constitute no defense; the indorser's contract is in writing, in legal contemplation, and cannot be changed by any contemporaneous parol understanding.

Bank of U. S. v. Dunn, 6 Pet., 51.
Brown v. Wiley, 20 How., 442.

C. The denial of sufficient knowledge or information to form a belief as to the interest of the other plaintiffs beside Mr. D. J. Foley, is evasive and frivolous. The *partnership* between them is not denied, and the fact that the dealing of the firm may have been conducted by one of its members may account for, but ought not to excuse, such an averment in the answer, or the verification of it. It cannot, of course, affect the right of action; the production of the bill, sworn to be in the possession of the attorneys for defendants

in error, before the answer was made, (see record, folic 7,) proved their joint right; and the plaintiffs in error were entitled to an inspection on demand, and were not at liberty to deny information

Nor would the issue be of any materiality. The indorsee and rightful holder, according to the answer, is one of the plaintiffs in the action, and his admission that others are entitled with him to the contents of the bill cannot harm the plaintiffs in error, since he is barred.

II.

It is respectfully suggested that the case demands the application of the second paragraph of the 23d rule. If the view of the answer taken by counsel for defendants in error be right at all, it is so plainly right that the utter want of defense to the bill must have been perfectly understood by plaintiffs in error; and the course pursued, of omitting to ask leave to amend and making no further opposition to judgment, demonstrates their consciousness of liability. The defendants in error advanced a considerable sum of money upon commercial paper, to be repaid within a short time, and have been prevented from realizing payment for already more than two years and a half, when the debtors had not only no defense, but no apparent belief that they had any. It would not be difficult to understand how such a course might be so oppressive, in some cases, as

to cause the failure or suspension of business of the unfortunate holder of such paper. The case is not unlike

Sutton v. Bancroft, 23 How., 320. And see—
Lathrop v. Judson, 19 ib., 66.
Prentice v. Pickersgill, 6 Wall, 511.
Campbell v. Wilcox, 10 ib., 421.
Insurance Co. v. Huchbergen, 12 ib., 164.
Pennywit v Eaton, 15 ib., 382.
Hall v. Jordan, 19 ib., 271.

Wherefore an affirmance with damages and interest is prayed.

WM. F. VILAS,
Counsel for Defendants in Error.

Supreme Court of the United States.

NO. 165.

TEE SAME, PLAINTIFFS IN ERROR,

VS.

THE SAME, DEFENDANTS IN ERROR

BRIEF FOR DEFENDANTS IN ERROR.

This cause is in all respects the same as the preceding one between the same parties, except that it was brought upon *two* similar bills of exchange, payable one on the 15th of February and the other the 15th of March, 1874. The plaintiffs in error made the same answer to both bills as in the preceding cause, and the same proceedings followed.

There was also in the answer a denial of presentment and protest of one of the bills; but this defense the plaintiffs in error withdrew.

See Record, folio 13.

The same argument and prayer for affirmance, as in No. 164, is respectfully submitted.

WM. F. VILAS,
Counsel for Defendants in Error.